

**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of Southeastern Legal Foundation )  
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Filing Date: May 1, 2014 ) Case No.: FIA-14-0027  
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Issued: May 19, 2014

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**Decision and Order**  
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On May 1, 2014, Southeastern Legal Foundation (Appellant) filed an Appeal from a determination issued to it on March 7, 2014, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. HQ-2010-01264-F). In that determination, NNSA released 41 documents which were responsive to the request the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal challenges the search for responsive documents.

**I. Background**

On April 12, 2010, the Appellant filed a request with the DOE's Office of Information Resources (OIR) for

1. Research data produced by Dr. Benjamin Santer at the Lawrence Livermore National Laboratory [(LLNL)]<sup>1/</sup> under the 2005 Distinguished Scientist Fellowship award from the DOE;
2. Actions taken by the DOE, including promulgation of new regulations and revisions, amendments, or additions to existing regulations, as well as order having precedential effect, or any other adjudications by the DOE and any of its subdivisions, that were based on research produced by Dr. Benjamin Santer under the 2005 Distinguished Scientist Fellowship award; and
3. Actions taken by the DOE including promulgation of new regulations revisions, amendments, or additions to existing regulations, as well as orders having precedential effect, or any other adjudications, by the DOE and any of its subdivisions, that were based on research produced by any scientists or

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<sup>1/</sup> NNSA manages FOIA requests for LLNL.

researcher at [LLNL] on the subject of anthropogenic climate change in the last ten years.

E-mail Request dated April 12, 2010, from Shannon L. Goessling, Appellant, to Alexander Morris, FOIA Officer, OIR, DOE. In response, OIR referred the request to LLNL, which released 41 documents responsive to the first request.<sup>2/</sup> Determination Letter dated March 7, 2014, from LLNL to Appellant. The Appellant challenges OIR's search for responsive documents, claiming that it requested all research data from Dr. Santer, not only final papers; that it would hope DOE would not expend \$1.25 million of taxpayer funds on research that yielded no action or consideration by the DOE; and that a search of LLNL's website shows 718 records relating to anthropogenic climate change. Appeal Letter from Shannon L. Goessling, Appellant, to Director, Office of Hearings and Appeals (OHA) at 2.

## II. Analysis

### A. Adequacy of NNSA's and LLNL's Search for Responsive Documents

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord *Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., *Project on Government Oversight*, Case No. TFA-0489 (2011).

We contacted NNSA to determine what type of search was conducted in response to the request. We were informed that LLNL contacted Dr. Benjamin Santer directly to conduct the search. E-mail dated May 7, 2014, from Berta Salazar, NNSA, to Janet R. H. Fishman, OHA, DOE, enclosing an e-mail response from Daniel Culver, NNSA, to Berta Salazar. According to the information we were provided, "Dr. Santer was advised to search his electronic and hard-copy files for responsive records. Dr. Santer's knowledge of the subject matter is beyond question." *Id.* Given this information, we find that LLNL's search for the requested information was adequate. LLNL asked the individual most knowledgeable about the subject matter to conduct the search. Dr. Santer was asked to search both his electronic and hard-copy files. As stated above, the standard for agency search procedures is reasonableness, which "does not require absolute exhaustion of the files." *Miller*, 779 F.2d at 1384-85.

Also, the original request was for "[r]esearch data *produced* by Dr. Benjamin Santer." E-mail Request dated April 12, 2010 (emphasis added). In fact, Dr. Santer does not produce any measurement or observations, instead relying upon data from other institutions. E-mail dated May 7, 2014, from Jonathan R. Celniker, LLNL, to Daniel Culver, NNSA, forwarded to Janet R. H. Fishman, OHA, DOE, by Berta Salazar, NNSA. Furthermore, on May 11, 2012, the

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<sup>2/</sup> In the processing of this Appeal, we determined that prior to sending the request to NNSA, OIR asked both the Office of Science and the Office of Policy and International Affairs to search their records for responsive documents.

Appellant told NNSA to “[p]lease advise LLNL that we will consider a listing of those articles, with full citations to co-authors, dates, and titles, in whatever industry journal they appear, to be a complete response to Item #1 of our original request.” Appeal Letter, Attachment 4 at p.4. Despite the Appellant’s claim to the contrary, it agreed in 2012 that a listing of Dr. Santer’s final articles would be a complete response to the first item in its request. We will therefore deny the Appellant’s Appeal in regard to its search for responsive documents responsive to the first element of the request.

As to the second and third requests, NNSA has informed us that climate change research is not part of its core mission, and therefore, no actions were taken regarding any climate change research done at LLNL. Memorandum of May 13, 2014, Telephone Conversation between Daniel Culver, General Attorney, NNSA, and Janet R. H. Fishman, Attorney-Adviser, OHA, DOE. NNSA stated that the Office of Biologic and Environmental Research (BER) funded Dr. Santer’s grant and the other climate change research, and is the only office that LLNL could suggest would take any action on that research. *Id.*

#### **B. Adequacy of DOE’s Search for Responsive Documents**

OIR has informed us that when it received the original request from the Appellant in 2010, it asked the Office of Science (SC) and the Office of Policy and International Affairs (PI) whether either office had any responsive documents. Both SC and PI answered in the negative. E-mails dated May 8, 2014, from Alexander Morris, Director, OIR, to Janet R. H. Fishman, OHA, DOE, forwarding e-mails from SC and PI. While PI stated that it had nothing responsive, SC stated that it did not promulgate regulations and, therefore, had nothing responsive. Our review of the request indicated that the Appellant was asking for more than regulations. Therefore, we requested that OIR ask both offices again if they had anything responsive. By email dated May 8, 2014, OIR again asked both SC and PI to search for responsive documents. As of the date of this decision, no response has been received from either office. Therefore, we will remand the matter to OIR for a new determination when it has the results of those searches.

### **III. Conclusion**

After considering the Appellant’s arguments, we agree that NNSA and LLNL conducted a search reasonably calculated to uncover documents responsive to the Appellant’s request. OIR is conducting an additional search of both SC and PI. We will remand the matter to OIR for a new determination once those searches are complete. Accordingly, the Appeal will be granted in part and denied in all other respects.

It Is Therefore Ordered That:

- (1) The Appeal filed by Exchange Monitor Publications, Case No. FIA-14-0010, is hereby granted as set forth in paragraph (2) below and denied in all other respects.
- (2) The matter is remanded to the Office of Information Resources so that it may issue a new determination once it receives the results of the searches of the Office of Science and the Office of Policy and International Affairs.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: May 19, 2014